ATTORNEY-GENERAL

v.

GAPARI KITINGAN

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
HAIDAR MOHD. NOOR J
[ORIGINATING SUMMONS NO. K. 18 OF 1990]
16 JUNE 1990

EVIDENCE: *Criminal proceedings - Recording of evidence outside jurisdiction - Applicability of Rules of High Court 1980 to criminal proceedings - Orders 38, 39 of Rules of the High Court 1980.*

CIVIL PROCEDURE: *Criminal proceedings - Recording of evidence outside jurisdiction - Applicability of Rules of the High Court 1980 to criminal proceedings - Sections 3, 16 of Courts of Judicature Act and s. 21(1) Interpretation Act 1967.*

STATUTORY INTERPRETATION: *"Matter" and "cause" in O. 39 Rules of the High Court 1980 - Sections 3 and 16 Courts of Judicature Act 1964 - Section 21(1) Interpretation Act 1967.*

The respondent was charged in the Sessions Court with 7 counts of corruption under s. 4 of the Prevention of Corruption Act 1961; these proceedings were transferred to the High Court by the applicant. The matter was fixed for hearing but prior to the hearing date, on the *ex-parte* application of the applicant, an order was made under O. 39 r. 1 of the Rules of the High Court 1980 (RHC) for the recording of evidence of witnesses outside the jurisdiction. The respondent applies to set aside this order.

The central issue for determination by the Court was whether the Rules of the High Court 1980, and in particular O. 39, applied to criminal proceedings.

Held:

[1] Taking into account ss. 3 and 16 of the Courts of Judicature Act 1964 *vis-a-vis* s. 21(1) of the Interpretation Act and the judgment of Abdoolcader SCJ in *Dato' Hashim's* case it is clear that O. 39 is applicable to criminal proceedings.

[2] There is no necessity for the applicant to show that some attempt had been made to procure the attendance of the witnesses in our jurisdiction - see O. 38 r. 9 of the Rules of the High Court 1980 and *Mallal's Supreme Court Practice* p. 460.

[3] The respondent's submission as to the form of the order cannot succeed as O. 39 r. 3(2) of the Rules of the High Court 1980 itself provides for the letter of request to be in Form 76 with such variations as the order may require; since the proceedings are criminal in nature, the forms must of necessity vary to suit the particular circumstances of the criminal case pending before this Court.

[Respondent's application dismissed.]

Cases referred to:

Dato Hashim Shamsuddin v. Attorney-General Hongkong [1986] CLJ (Rep) 89
T.R. Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd. [1985] CLJ (Rep) 312

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 16
Criminal Procedure Code, ss. 376(i), 418A
Interpretation Act 1967, ss. 2(1)(e), 21(1)
Rules of the High Court 1980, O. 1 rr. 2(2), (3), 7, O. 29 r. 1(4), O. 39 rr. 1, 2(1), O. 66 r. 1(1)
Prevention of Corruption Act 1961, s. 4
Supreme Court Practice 1982 [UK], O. 1 r. 9(1)

Other source referred to:
Mallal's Supreme Court Practice 2nd Edn., p. 7

For the applicant - Ghani Patail & Ng Aik Guan; M/s. Attorney-General's Chambers
For the respondent - Ronald Khoo & Simon Shim; M/s. Shim, Pang & Co.

JUDGMENT

Haidar Mohd. Noor J:

This is an application by the respondent, Gapari bin Kitingan @ Datuk Dr. Jeffrey G. Kittingan to set aside the order made by Mohd. Noor J on 19 March 1990. The order was made under O. 39 of the Rules of the High Court 1980, ('RHC') on the *ex-parte* application of the Attorney-General, Malaysia the applicant.

On 23 January 1990 criminal proceedings pertaining to seven charges for corruption under s. 4 of the Prevention of Corruption Act 1961 (Act No. 57) were instituted against the respondent in the Sessions Court, Kota Kinabalu by the public prosecutor, who is also the Attorney-General (see s. 376(i) of the Criminal Procedure Code (FMS Cap. 6)). On the same day the criminal proceedings were ordered to be transferred to the High Court, Kota Kinabalu on the certificate issued by the public prosecutor under s. 418A of the Criminal Procedure Code. The case came for mention on 12 February 1990 in the High Court, Kota Kinabalu wherein it was fixed for hearing from 2 to 31 May 1990. When the case came for hearing on 2 May, it was adjourned to 11 August 1990 for mention at the request of the applicant in order that evidence of five witnesses in Hongkong may be recorded by virtue of the order obtained by the applicant on 19 March 1990. The respondent did not object to the application for adjournment.

The prosecution requires the evidence of five witnesses from Hongkong in respect of the criminal case against the respondent and as these witnesses are outside our jurisdiction, an *ex-parte* application was made by the applicant under O. 39 of the RHC *vide* Originating Summons No. K18 of 1990 and an order was granted accordingly and hence this present application by the respondent to set it aside.

The main thrust of the argument of Mr. Ronald Khoo, Counsel for the respondent, is that the RHC in particular O. 39 does not apply to criminal proceedings and he sought to draw a distinction between this case and the case of *Dato Hashim Shamsuddin v. Attorney-General Hongkong* [1986] CLJ (Rep) 89. *Dato Hashim's* case in my view, is about the only case that may be relevant to consider on the issue of whether RHC or part thereof is applicable or otherwise to criminal proceedings when the Supreme Court considered O. 66 of RHC. I do not think I need to go as far as England or India for authorities as urged by Mr. Ronald Khoo. The position of *Dato Hashim's* case is the reverse of the present case. The Supreme Court by a majority judgment held "O. 66 of the Rules of the High Court is valid and properly enacted in relation to both civil and criminal proceedings and therefore the order made in this case is *intra vires*". The issue is narrowed down as to whether the applicant can invoke O. 39 of RHC particularly r. 2 as in this case?

It is true that the Supreme Court only considered O. 66 of RHC in Dato Hashim's case whereas in this case I have to consider O. 39 and its effect in respect of criminal proceedings. Be that as it may, Abdoolcader SCJ, extensively considered s. 16 of the Court of Judicature Act 1964 ('CJA') *vis-a-vis* the relevant provisions of RHC and in my view, the judgment is definitely relevant and of considerable assistance for my consideration of O. 39 and its application to the present case.

Order 39 r. 1 provides for the taking of evidence within jurisdiction before a trial of a witness who is expected to be unable to attend it whereas O. 39 r. 2 provides for a witness to be examined is out of jurisdiction.

Order 39 r. 1 reads:

> The Court may, *in any cause or matter* where it appears necessary for the purposes of justice, make an order in Form 73 for the examination on oath before a Judge or the Registrar or some other person, at any place, of any person.

Whereas O. 39 r. 2(1) reads:

> Where the person in relation to whom an order under r. 1 is required is *out of jurisdiction,* an application may be made:
>
> (a) for an order in Form 74 under that rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person; or
>
> (b) if the Government of that country allows a person in that country to be examined before a person appointed by the Court, for an order in Form 75 under that rule appointing a special examiner to take the evidence of that person in that country.
> (Emphasis added)

The words 'matter' and 'cause' are used both in O. 39 and O. 66. Abdoolcader SCJ at p. 103 said:

> The phrase 'in relation to a matter' in r. 1(1) of O. 66 ineluctably connotes the application of that order to criminal as well as civil matter, as, although 'matter' is not defined in the RHC, the latter were enacted under the Courts of Judicature Act 1964 ("the 1964 Act") and constitute subsidiary legislation thereunder, and *the definition of 'matter' read with, that of 'proceeding' in s. 3 of the 1964 Act which clearly includes criminal proceedings applies equality to the provisions of the RHC by virtue of s. 21(1) of the Interpretation Act 1967 (which applies thereto pursuant to s. 2(1)(e) thereof) which provides that terms and expressions used in subsidiary legislation have the same meaning as in the written law under which it was made.*
> (Emphasis added)

The effect of O. 1 r. 2(2) and (3) was adequately considered and dealt into by Abdoolcader SCJ also where his Lordship said at p. 103:

> I would emphasise that O. 1 r. 2(3) in specifically providing an exception to the provisions of para. (2) of that rule categorically *permits the application of the RHC or any provisions thereof* in relation to the proceedings specified in para. (2) of r. 2.
> (Emphasis added)

It would seem clear to me that O. 39 is applicable to criminal proceedings.

As to the submission of Mr. Ronald Khoo in regard to the question of the statutory source or enabling provision for the enactment of O. 39, the short answer can be found in the judgment of Abdoolcader SCJ at pp. 122/123 though it relates to O. 66 but in my view, the same reasoning equally applies to O. 39 as to construe otherwise would be fallacious.

Mr. Ronald Khoo went on to argue that even assuming O. 39 is applicable in criminal proceedings, there is, according to him, not an iota of evidence to show that some attempt has been made to procure attendance of the witnesses in our jurisdiction to give evidence at the criminal trial against the respondent and as such there was no sufficient justification for deviation from the normal practice of examining witnesses in Court. According to *Mallal's Supreme Court Practice* at p. 460:

> A party cannot compel a witness in a foreign country to attend trial since a writ of *subpoena ad testifacandum* does not extend beyond jurisdiction. To obtain the evidence of a witness who is unable or unwilling to attend the trial, the Court may make an order for his examination abroad, if satisfied that the application was made *bona fide* and with such promptitude so as not to cause unreasonable delay and the evidence of the witness is relevant and material to the issue and could not be obtained otherwise.

In fact according to O. 38 under the caption "Evidence General" r. 9 provides for depositions of witnesses who are beyond the jurisdiction of the Court to be receivable in evidence and therefore there is absolutely no necessity for the applicant to show of attempt to procure the five witnesses who are indisputably beyond our jurisdiction. However, there is a safety valve where under para. 2 of r. 9 the applicant intending to use any deposition in evidence at the trial of a cause or matter must, a reasonable time before trial, give notice of his intention to do so to the respondent. Even in the letter of request to the Hongkong authorities, there is a request that the respondent or such of them be allowed to cross-examine the witnesses that may be produced on behalf of the applicant. Where then is the injustice that may be caused to the respondent? From a perusal of the *ex parte* application of the applicant, I am more than satisfied and so must be Mohd. Noor J, that the evidence of the five witnesses are relevant and material to the issue and could not be obtained otherwise. The allegation of fishing therefore has no substance at all.

As to the deviation in the forms used, I need only refer to the then Federal Court case of *T.R. Hamzah & Yeang Sdn. Bhd. v. Lazar Sdn. Bhd.* [1985] CLJ (Rep) 312 relied on by the applicant. In the said case, Lee Hun Hoe CJ (Borneo) said at p. 315:

> The appellant took objection to the form of the order as it was contrary to O. 29 r. 1(4) of the Rules of the High Court 1980 which provides that "An order for interim injunction must be in Form 58". He referred to the *Supreme Court Practice 1982* and cited *Gebruder Naf v. Ploton* [1890] 25 QBD 13 and *Morgan v. Greatrex* [1884] WN 21. We think in the circumstances his objection is without substance. Order 1 r. 7 of the Rules of the High Court is clear and states that:
>
> > The forms in Appendix A shall be used where applicable with such variations as the circumstances of the particular case require.
>
> The English O. 1 r. 9(1) of the *Supreme Court Practice 1982* is practionally word for word the same as our O. 1 r. 7 except for our "Appendix A", the English uses "Appendices". *The Supreme Court Practice 1982*, Vol. 1, at p. 9 under the effect of the rule it is stated:
>
> > The need for these prescribed forms is to ensure, so far as possible, uniformity and conformity in the practice and procedure of the High Court. They must be used whenever applicable, but nevertheless a certain latitude is permitted, so that these forms are allowed to be used "with such variations as the circumstances of the particular case require". This latitude is intended to mitigate excessive formality and technicality, when a variation to meet the requirements of a particular case would make the form more valuable and suitable as an instrument to achieve the real objective of the form...

The learned Chief Justice, went on to quote a passage from *Mallal's Supreme Court Practice*, 2nd Edn., at p. 7.

I observe that O. 39 r. 3(2) of RHC itself provides for the letter of request to be in Form 76 with **such variations as the order may require**. In view of the proceedings being criminal in nature, the forms must of necessity vary to suit the particular circumstances of the criminal case pending before this Court and the objection of Mr. Ronald Khoo on the variations in the forms cannot be sustained.

On the issue of the admissibility of the depositions at the criminal trial raised by Mr. Ronald Khoo, in my view, even if there is merit in such a contention it is premature to raise it at this stage. The steps taken by the applicant for the present moment are purely to record evidence of certain witnesses in Hongkong. Now, whether there is a similar provision as our O. 66 of RHC in the Hongkong legislation and the admissibility of certain evidence over there is a matter for the applicant to consider and I am sure the applicant knows what he is doing otherwise it will be an exercise in futility.

In the circumstances I am of the view that the applicant can resort to O. 39 of RHC in this case and the order was rightly granted. The application of the respondent is dismissed with costs.

Also found at [1990] 2 CLJ 707